

{¶4} R.C. 9.86 states, in part:

{¶5} *** no officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damages or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner. *** (Emphasis added.)

{¶6} It is undisputed that Dr. Sherman was employed by both defendant, University of Cincinnati (UC), and by University Rehabilitation Inc. (URI), a not-for-profit, professional practice corporation for the physicians of the Department of Physical Medicine and Rehabilitation. It is also undisputed that during all interactions with plaintiff, Dr. Sherman did not act maliciously, in bad faith or in a wanton and reckless manner. Therefore, the sole issue before the court is whether Dr. Sherman's interactions with Lynd were manifestly outside the scope of his employment as an assistant professor at UC.

{¶7} Several factors are to be used in determining whether a physician, who holds a faculty position at a state university, is entitled to civil immunity while also maintaining a private medical practice. These include: 1) an analysis of the organizational nature of the private practice group; 2) whether billing is processed through the practice plan; 3) the amount of the university's financial gain versus the physician's financial gain from services rendered; 4) whether the private practice group provides malpractice insurance coverage; and, 5) an analysis of the contractual relationship between the partnership and the university. See *Katko v. Balcerzak* (1987), 41 Ohio App.3d 375; *York v. Univ. of Cincinnati Med Ctr.* (Apr. 23, 1996), Franklin App. No. 95API09-1117, unreported; *Balson v. The Ohio State University* (June 25, 1996), Franklin App. No. 95API10-1344, unreported; *Harrison v. Univ. of Cincinnati Hosp.* (June 28, 1996), Franklin

App. No. 96API01-81, unreported. Additionally, the Tenth Appellate Court of Appeals recently held:

{¶8} The two major determining factors to be used in finding whether a physician was acting outside the scope of his or her employment for a state university hospital are: (1) whether the patient was a private patient of the physician, rather than a patient of the university; and (2) the university's financial gain from the medical treatment at issue relative to the physician's financial gain therefrom.

{¶9} *Sheila Ann Kaiser, Admr. v. John B. Flege, M.D., et al.* (Sep. 22, 1998), Franklin App. No. 98AP-146, unreported, citing *Norman v. Ohio State Univ. Hosp.* (1996), 116 Ohio App.3d 69, at 77.

{¶10} The court finds that the case *sub judice* is analogous to *Harrison, supra*. In both cases, the physician was employed by both UC and a private practice group, although not in the same specialty. In both cases, the UC College of Medicine required each department to have a practice plan, and the board of trustees required the practice plan to be filed with and approved by the Dean of the College of Medicine. Each faculty member of the College of Medicine was required to be a member of a practice plan.

The dean monitored each plan and approved the salary of each faculty member paid by UC.

{¶11} Thomas Lynd was referred by his private physician to Dr. Rosenberg, who does not assert civil immunity as a state employee pursuant to R.C. 9.86 and who, in turn, referred Lynd to Dr. Sherman. Dr. Sherman treated Lynd at Drake Center, a county hospital staffed by members of URI that provides, *inter alia*, both inpatient and outpatient rehabilitation services. Defendant does not own or operate Drake Center. Accordingly, the court finds that Lynd was a private patient of Dr. Sherman, rather than a patient of defendant's medical facility.

{¶12} During 1997, Dr. Sherman was paid a salary of \$20,900.76 for his faculty duties at UC. Additionally, upon his employment with URI, Dr. Sherman contracted for a guaranteed salary. During

the corporate fiscal year 1997, July 1996 through June 1997, Dr. Sherman was guaranteed compensation of at least \$97,000. However, Dr. Sherman actually received 50% of his \$206,010 collections in fiscal year 1997, or approximately \$103,000 for his employment with URI. URI billed \$432,322.04 for Dr. Sherman's services during the fiscal year and paid the UC academic department \$106,000. However, this payment was based upon collections from all URI-member physicians. URI's total operating revenue was \$1,849,631 and the non-operating revenue during the fiscal year was \$116,088. Additionally, URI contributed \$35,000 to the UC self-insurance fund for malpractice coverage. Based upon the forgoing, the court finds that Dr. Sherman's financial gain was proportionally greater than that of UC during fiscal year 1997. After weighing all of the evidence, the court finds that Dr. Sherman was not acting within the course and scope of his employment as a UC faculty member when treating Lynd. See *Harrison, supra*; *Kaiser, supra*.

{¶13}Notwithstanding the court's analysis, defendant asserts that its board of trustees is vested with the power to define the scope of employment of physicians employed through the various practice plan corporations and, thereby, to grant civil immunity to physicians of certain plans while denying immunity to others who are employed by practice plan corporations which practice in "high risk" specialties. Defendant maintains that the UC Board of Trustees has broad statutory discretion to define the scope of faculty employment pursuant to its power to manage and operate in accordance with R.C. 3361.01 and its discretion to employ, compensate, and "do all things necessary for the creation, proper maintenance, and successful and continuous operation of the university ***" in accordance with R.C. 3361.03. R.C. 1.51 states:

{¶14}If a general provision [of the Ohio Revised Code] conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision. ***"

{¶15}This court does not agree that R.C. 3361.01 and 3361.03 are exceptions to the legislature's enactment of the civil immunity provisions of R.C. 9.86 and 2743.02(F). In May 1986, the board of trustees adopted a resolution which provides for patient care as being both essential and a direct benefit to the university. Defendant asserts that the resolution is consistent with the aforementioned discretionary powers. As a continuation of this philosophy, UC considers a faculty physician providing patient care to be within the course and scope of his university employment when acting pursuant to the terms of the 1986 resolution; *i.e.*, when the patient care is provided through an approved practice corporation.

Defendant further maintains that where its approved practice plans are either "not-for-profit," or owned by UC Medical College Department Chairpersons *ex officio*, and are organized as tax-exempt by the U.S. Internal Revenue Code, the ownership of those practice plans is under the control of the university. Defendant asserts that URI is such a corporation.

{¶16}All state-operated hospitals have approved practice plans permitting their physicians to engage in the private practice of medicine. However, unlike virtually all of the other state-operated hospitals, defendant consistently attempts to stipulate immunity for most of its physicians and attempts to do so in the instant action. This court is of the opinion that only the Ohio General Assembly has the power to grant immunity to government employees and that it must be in accordance with R.C. 2743.02(F) and 9.86. As the Supreme Court of Ohio recently stated:

{¶17}The legislative process and accountability are the cornerstones of the democratic process which justify the General Assembly's role as lawmaker.

{¶18}If the constituents are unhappy with the policy determinations made by members of the General Assembly, they can change the makeup of the General Assembly at the voting booth. Thus, in effect, citizens of the state may shape the nature of legislation."

{¶19} *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563.

Defendant is required to follow the law. The facts in each case will determine whether employees are entitled to civil immunity at any state-operated hospital. The court will look to substance over form in making its analysis of each practice group. It is the court's best judgment that R.C. 2743.02(F) and 9.86 do not give defendant or its board of trustees broad discretionary power to grant physicians under its practice plans such a benefit at the expense of the taxpayers of the State of Ohio, and to thereby deny all potential plaintiffs the opportunity to sue such physicians in a court of common pleas. A public policy determination is properly within the domain of the legislature. Elected public officials are subject to accountability.

{¶20} The court finds that Dr. Sherman rendered medical services to Lynd as an employee of URI, rather than as defendant's employee. Accordingly, the court finds that Dr. Sherman is not entitled to personal immunity under R.C. 2743.02(F) and 9.86. The courts of common pleas have jurisdiction to hear plaintiffs' claims against Dr. Sherman and there is no just reason for delay.

FRED J. SHOEMAKER
Judge

IN THE COURT OF CLAIMS OF OHIO

THOMAS LYND, et al. :
Plaintiffs : CASE NO. 97-13242
v. : JUDGMENT ENTRY
UNIVERSITY OF CINCINNATI, etc. : Judge Fred J. Shoemaker
Defendant :

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{¶21} This court conducted an evidentiary hearing on the parties' stipulations and briefs. The court has considered the evidence and rendered a decision filed herein. Based on the totality of the facts and the law, the court finds that Dr. Sherman is not entitled to personal immunity. The courts of common pleas have jurisdiction to hear plaintiffs' claims against Marc Sherman, M.D., and there is no just reason for delay.

FRED J. SHOEMAKER
Judge

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